

PANJAVARNAN v. PUBLIC PROSECUTOR

[A.Cr.J. (MacIntyre J.) April 7, 1966]

[Ipoh — Criminal Appeal No. 96 of 1965]

Criminal Law and Procedure — Trial — Demeanour of witness — Questions put to accused by magistrate — Questions not asked for purpose of obtaining explanation from appellant of circumstances appearing in the evidence against him — Whether this vitiates trial — Irregularity curable — Criminal Procedure Code (Cap. 6), ss. 256, 271 & 422.

This was an appeal against the conviction of the appellant for the offence of voluntarily causing hurt with a knife. At the trial the magistrate had noted, after a witness for the prosecution had given evidence and before he was cross-examined, that the witness had impressed him as speaking the truth. The learned magistrate after the close for the defence questioned the accused. The purpose of this, it appeared, was not to seek an explanation of any circumstances appearing in the evidence against him, but to get an admission that he had harboured a grudge against the complainant.

Held: (1) an impression as to demeanour ought not to be adopted without testing it against the whole of a witness's evidence and a finding of credibility ought not to be made without testing the witness' evidence against the whole of the evidence; but in this case the finding of the magistrate as to the credibility of the witness had not occasioned a failure of justice as there was ample corroborative and independent evidence, besides the evidence of the witness, to convict the appellant;

(2) the learned magistrate had failed to comply with the provisions of section 256 of the Criminal Procedure Code in that his questions were not asked for the purpose of obtaining an explanation from the appellant of any circumstances appearing in the evidence against him but as in this case the question of motive was irrelevant in determining the guilt or innocence of the appellant the questions put by the magistrate to the appellant had not occasioned a failure of justice and the irregularity was curable under section 422 of the Criminal Procedure Code.

Cases referred to:—

(1) *Yuill v. Yuill* [1945] 1 All E.R. 183.

(2) *Abraham Ho Ah Loke v. William Manson-Hing* [1949] M.L.J. 37.

(3) *Paltu Goswami v. Ram Kumar Das* A.I.R. 1960 Tripura 40.

(4) *Raijaua v. The State* A.I.R. All. 718.

CRIMINAL APPEAL.

D.R. Seenivasagam for the appellant.

James Loh (Deputy Public Prosecutor) for the respondent.

MacIntyre J.: The appellant in this case was convicted by the magistrate at Ipoh of voluntarily causing hurt to P.W.2 by means of a cutting instrument, to wit, a knife, an offence punishable under section 324 of the Penal Code and was sentenced to 6 months imprisonment and three strokes of the rattan.

The evidence against the appellant is fairly straightforward and consists of the testimony of P.W.2 and of two other eye-witnesses. The weapon alleged to be used is a curved knife used for tapping toddy and the medical evidence con-

A firms the use of such a weapon.

Just before the close of the cross-examination of P.W.2, the trial magistrate made a note to the effect that the witness had impressed him as speaking the truth. Because of this remark, counsel for the appellant contended that there had been a miscarriage of justice on the ground that the magistrate had prejudged the credibility of the complainant before hearing the rest of the evidence in the case.

Now section 271 of the Criminal Procedure Code empowers a magistrate to make a note, at the conclusion of the evidence of a witness, of his impression as to the witness' demeanour under cross-examination. It is settled law that an impression as to demeanour ought not to be adopted without testing it against the whole of a witness' evidence (vide *Yuill v. Yuill* ⁽¹⁾) but a finding as to credibility ought not to be made without testing the witness' evidence against the whole of the evidence adduced in the case (vide *Abraham Ho Ah Loke v. William Manson-Hing* ⁽²⁾).

In the instant case, the finding by the magistrate of the credibility of P.W.2 might have occasioned a failure of justice had the case against the appellant rested solely on his evidence. I am satisfied from the record that the magistrate had before him, beside the evidence of P.W.2, ample corroborative and independent evidence to convict the appellant. The appeal on this ground must therefore fail.

The next point urged before me was that the trial had been vitiated by illegality, in that the magistrate had after the close of the case for the defence questioned the appellant in the dock and admitted certain unsworn statements which were prejudicial to him. It was further contended that the procedure followed by the magistrate being illegal and not merely irregular, it was immaterial whether there was sufficient evidence to convict the appellant or not and that the conviction should be set aside as the illegality is incurable by section 422 of the Code.

Now when questioned by the magistrate, this is what the appellant said:

"I am not a sensitive person. I was annoyed when P.W.2 used a racial word 'bangsa' in the coffee shop. I was passive when P.W.2 attempted to throw a slipper on me at 6.30 p.m. I had no grudge."

It is apparent from these answers that what the magistrate sought to extract from the appellant was not an explanation of any circumstances appearing in the evidence against him but an admission that he had harboured a grudge against P.W.2 for using the word 'bangsa' in the course of a quarrel which had taken place earlier in the day and for threatening to assault him with a slipper about half an hour before committing the alleged offence of causing hurt.

Now the power of a magistrate, or his duty, if I may say so, to put questions to an accused person not under oath is provided by sub-sections (i) and (ii) of section 256 of the Criminal Procedure Code which read as follows:

"(i) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the court may at any stage of a trial or an inquiry, without previously warning the accused, put such questions to him as the court considers necessary.

(ii) For the purpose of this section the accused shall not be sworn and he shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them, but the court may draw such inference from such refusal or answers as it thinks just."

The corresponding section in the Straits Settlements Code has been repealed. It is my opinion that this section is intended to be used when an accused person elects not to give evidence on his own behalf or where he had given evidence but it is discovered subsequently that he had omitted to explain certain circumstances that appear in the evidence against him. According to the section, the questions may be put at any stage of the trial but it was contended that that did not mean that the questions could be put after the case for the defence had been closed. I cannot agree with this interpretation. In my opinion the words "at any stage of the trial" must mean at any time between the commencement of the trial and the delivery of judgment.

In this connection, it must be noted that the corresponding Indian section, which is section 342 of the Indian Criminal Procedure Code of 1898, specifically lays down that the stage at which the questions should be put is after the close of the case for the prosecution and before the defence is called. Yet in *Paltu Goswami v. Ram Kumar Das*,⁽³⁾ where a magistrate had questioned the accused after the case for the defence had been closed and before delivery of judgment and had offered an opportunity to the defence to examine further witnesses which they did not avail themselves of, it was held that the mere delay in questioning the accused under section 342 was an irregularity which was curable under section 537 of the Indian Criminal Procedure Code. Section 537 is almost similar to section 422 of our Code. It is quite true that in the instant case, the magistrate did not, after he had questioned the appellant, offer an opportunity to the defence to examine further witnesses, but the facts elicited were not in the nature of fresh evidence against the appellant to prove his guilt. In fact the statement by the appellant to the effect that he was not annoyed when P.W.2 threatened to strike him with a slipper about half an hour before the commission of the alleged offence is evidence in favour and not against the defence. It would therefore

A appear that the principle underlying the decision in *Paltu Goswami v. Ram Kumar Das*, *supra*, would apply with great force to the facts of this case.

B However, the main issue is whether or not the failure of the magistrate to comply generally with the provisions of section 256 and particularly with the provisions of 256(i), in that his questions were not asked for the purpose of obtaining an explanation from the appellant of any circumstances appearing in the evidence against him, vitiated the trial. I think that the answer to the question must depend upon whether or not the appellant had been in any way prejudiced by the questions asked. It appears to be well settled in India that the omission to properly examine an accused person under section 342 is not necessarily fatal to the prosecution if the accused had not been prejudiced in any manner (*vide Rajjaua v. The State* ⁽⁴⁾). I fully
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D concur with that view.

E It is clear from the record that the magistrate had questioned the appellant with a view of getting him to admit a motive for causing hurt to P.W.2. Since the evidence adduced in this case to prove the charge against the appellant is direct and not circumstantial, the question of motive, except in relation to the assessment of the sentence to be passed in the event of a conviction, is irrelevant for the purpose of determining the guilt or innocence of the appellant. I therefore hold that the questions put by the magistrate to the appellant had not occasioned a failure of justice and that the irregularity is curable by section 422 of the Criminal Procedure Code.
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G The third ground of appeal is that the magistrate had misdirected himself on the law in regard to the principles to be applied in a defence of *alibi* and that he had not given reasons for not accepting the defence. This ground was not pursued at the hearing of this appeal and I will therefore say without giving any reason, that there is no substance in this ground of appeal.

H The appeal against conviction is therefore dismissed and I shall now hear counsel on the appeal against the sentence.

Appeal dismissed.

Solicitors: *S. Seenivasagam & Sons.*

PAN KOK WAH v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Thye F.J.) April 7, 1966]

[K.L. — Criminal Appeal No. 10 of 1966]

Customs and Excise — Possession of still — Difference between "possession" and "control" — Excise Act, 1961, ss. 17(1), 73 & 74.

In this case the appellant had been convicted of a charge which alleged that he had in his control a still